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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ANTHONY J. COSTANZO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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January 24, 1985

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QUESTIONS PRESENTED FOR REVIEW

1. Whether continued acceptance by an FBI office of reports from a government attorney-informant who was in direct and frequent contact with a defendant in a criminal case, his trial counsel and his licensed investigator before and during trial which included receipt of at least four known items of information about the trial constituted an intentional intrusion into the defense camp in violation of petitioner's Sixth Amendment right to the Assistance of Counsel.

2. Whether information received from a government attorney-informant in direct and frequent contact with a defendant in a criminal case, his trial counsel and his licensed investigator before and during trial that (a) the defense was attempting to subpoena a witness, (b) defendant had taped earlier conversations

with the FBI case agent and principal witness for the government in the trial, (c) defendant's trial counsel was suspended from practice of law and (d) defendant allegedly sought to bribe the government attorney informant to file a false affidavit, involved disclosures of confidential defense strategy information in violation of petitioner's Sixth Amendment right to the Assistance of Counsel.

3. Whether pervasive intrusion into the defense camp by a government attorney-informer with direct and frequent contact with a defendant in a criminal case, his trial counsel and licensed investigator before and during trial violated petitioner's Sixth Amendment right to Assistance of Counsel by itself without a showing of prejudice.

4. Whether under all the circumstances

of this case petitioner was denied his Sixth Amendment right to Assistance of Counsel.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported, as amended, at 740 F. 2d 251 (1984), and is reproduced in the appendix to this petition, A-1. The two opinions of the District Court are unreported and are set forth in the appendix, A-18 and A-37. Earlier decisions of the Court of Appeals in this case are reported at 625 F. 2d 465 (1980) and 591 F. 2d 1337 (without opinion), cert. denied, 441 U.S. 961 (1979).

JURISDICTIONAL GROUNDS IN THIS COURT

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was filed on July 26, 1984. Anthony J. Costanzo's timely petition for rehearing was denied by order dated August 27, 1984. Anthony J. Costanzo's time to file a petition for a writ of certiorari was extended to and including January 24, 1985, by an order of Justice Brennan. 28 U.S.C. §1254 (1) is the statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari.

STATEMENT OF THE CASE

Anthony J. Costanzo was convicted on both counts of a two-count indictment for conspiracy to possess and possession of nine stolen U. S. Treasury checks, in violation of 18 U.S.C. sec. 371 and sec. 1708, after a two-week jury trial in January 1978. He was sentenced to pay a $7,500 fine and to two and one-half years imprisonment, to be followed by five years probation. He has served his sentence and paid his fine.

Mr. Costanzo's defense, consisting of his own testimony, was that the government entrapped him because it was dissatisfied with his role as a government informant. He claimed another government informant gave him an envelope telling him it was a mortgage application, when in fact it contained stolen Treasury checks and asked him to take it to a company he later learned was a sham staffed by undercover

FBI agents. When he discovered the envelope contained government checks, Costanzo pursued the sale, receiving $1500 for the checks, in order to gather information about the other informant which he planned to turn over to the government.

The conviction was affirmed without opinion. United States v. Costanzo, 591 F.2d 1337 (3rd Cir. 1979); cert. denied, 441 U.S. 961 (1979).

The day he was ordered to surrender, June 6, 1979, appellant filed a motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure and a motion to vacate pursuant to 28 U.S.C. sec. 2255 claiming, among other things, government intrusion into his attorney-client relationship. The District Court denied his motions without holding an evidentiary hearing. The judgment was appealed.

On June 5, 1980, the Court of Appeals remanded the case "...for an evidentiary hearing as to appellant's claim of a Sixth Amendment violation..." arising from his relationship with an attorney, Frank Paglianite, who was regularly informing the FBI about Costanzo before and during his trial. United States v. Costanzo, 625 F.2d 465 (3rd Cir. 1980) at p. 471.

The Court of Appeals also observed in footnote 4 to its opinion that, in his reply brief, Mr. Costanzo stated his trial lawyer was at the time of trial "...suspended from practice in his home state." The question of the effect of such a suspension on Appellant's Sixth Amendment rights was not raised on that appeal. The Court said the issue could be raised on remand. United States v. Costanzo, supra, at p. 471.

On remand, the District Court held an evidentiary hearing, on the Sixth Amend-

ment issues arising from the conduct of attorney-informer Frank Paglianite and found no Sixth Amendment violation. It also took evidence as to whether appellant was denied effective assistance of counsel because his attorney at trial was suspended from practice at the time of the trial ruling that Costanzo was denied the effective assistance of counsel.

Both the United States and Mr. Costanzo appealed.

The Court of Appeals affirmed the District Court's findings concerning attorney-informer Paglianite, holding none of his disclosures "...were the product of intentional intrusion into the defense camp, involved confidential defense strategy information or were accompanied by a showing of prejudice." United States v. Costanzo, A-11. It reversed the District Court's finding that because Mr. Costanzo's trial counsel was

suspended from practice at the time of the trial he had no "representation in fact."

Frank Paglianite was a licensed attorney engaged in the practice of law in New Jersey throughout the 1970s. He was disbarred by the New Jersey Supreme Court on June 14, 1982 more than four years after this trial.

He was a regular informer for the FBI over a period of years. (PX, 27-30).* During the period from March 1977 through the conclusion of Costanzo's trial on January 13, 1978, FBI Agent Falls wrote memoranda of at least 174 separate communications he received from Paglianite about Costanzo. Agent Falls, stationed in New Jersey, was aware that Paglianite was a practicing attorney there (III, p. 150).

*"PX" references are to the exhibits of Anthony Costanzo at the hearing on remand. Roman numerals I-IV refer to the transcripts of the four days of the hearing, July 12-15, 1983.

FBI Agent William Mackey, stationed in New York City, also wrote several score memos of reports he received from Paglianite about Costanzo during the critical period March 1977 through January 13, 1978. Mackey also knew Paglianite was an actively practicing lawyer. (III, p. 75).

From the time of the indictment until the trial began, Costanzo testified he was constantly discussing the case with Paglianite. They discussed the facts, witnesses, legal issues, such as entrapment, daily developments. (II, 62-72). Paglianite helped Costanzo find both lawyers who later represented him. Charles Coveney, another FBI informer was often present in the meetings before the trial.

Costanzo testified he met with Paglianite five or six times during the trial. (II, p. 90). Both Costanzo and his attorney at the trial, John Seffern, testified

they spoke with Paglianite frequently during the trial after court sessions. (I, pp. 21-25, 51-58). Seffern remembered discussions with Paglianite about how to find Coveney, whether Costanzo should testify, the testimony of FBI agent Jumonville, the government's key witness, cross-examination of government witnesses, an immunity issue, and the trial generally, during the trial.

A licensed investigator, Harry Purcell, retained by Mr. Costanzo for the trial, also testified about discussions he had with Paglianite about Costanzo's case. Purcell testified Paglianite was to represent Costanzo in this case, but could not, because of a conflict, and Paglianite suggested a lawyer named Warren Wilentz. (I, p. 76). He testified he met and talked with Paglianite about the case "many times...more than twenty" before the trial while he was

preparing the defense. (I, p. 77). When they met they always discussed the case. He asked Paglianite for help and legal advice in preparing the case. (I, pp. 78-79). Mr. Purcell testified Coveney was nearly always at Paglianite's house before the trial. (I, p. 83). Both Paglianite and Coveney "pumped" him for information about the case. (I, pp. 81, 95).

When Purcell sought to serve a subpoena on Coveney during the trial, he could not find him. Coveney was not at Paglianite's house during the trial. Paglianite told Purcell that Coveney was in Boston on a case for him and later in Kansas. Once he said Coveney was in Texas. (I, pp. 84-85).

Though he received nearly daily calls from Paglianite about appellant from March through September 1977, FBI Agent Falls never raised the question of Paglianite's

attorney-client relationship with Costanzo until after Costanzo's arrest on September 29, 1977. (III, pp. 151-20). Falls conceded he was "...always uncertain as to Paglianite's exact status..." and did not believe everything Paglianite told him. (IV, p. 42, 43).

Though Paglianite was present in federal court when Costanzo was first arraigned, he told Costanzo from the beginning that he could not represent him in the case because of a conflict of interest.

On December 2, 3, 5, 1977, Paglianite told Agent Falls that Costanzo was looking for his investigator to "get" Charles Coveney. (PX, 29, p. 82). Asked what Paglianite or Costanzo meant by "get", Falls replied, "I have no specific idea, sir."

Agent Falls was told by Paglianite on December 22, 1977, two weeks before

the trial, that Costanzo had tape recorded FBI Agent Jumonville to whom Costanzo had reported regularly and who was the principal government witness against Costanzo in his trial. (PX 28, p. 84). Charles Coveney participated in the call. (IV, pp. 9-10). Asked if he passed the information on to anyone, Falls replied, "I don't recall if I did or not, sir." (IV, p. 15).

On December 27, a week before the trial, Agent Falls met Paglianite to pick up a tape recording Paglianite made of a conversation with Costanzo. Asked if he discussed the upcoming trial on that occasion, Falls answered, "Sir, I don't recall what I discussed, except to pick up the tape." (III, pp. 158-60).

During the latter part of the first week of January and of the trial, Coveney told Agent Falls "he was ducking a subpoena, that "he would not respond to that

subpoena, that he would not be available to testify on Mr. Costanzo's behalf." (IV, p. 19). Asked what he said when he was told this by Coveney, Falls replied, "I don't recall specifically, sir," adding that the "gist" of his comments to Coveney about dodging the subpoena was "...it was up to him." (IV, p. 20). Falls did not recall ever advising anyone that Coveney, a witness subpoenaed to testify in a criminal trial who was acting as his informant, was dodging the subpoena and would not appear at the trial. (IV, p. 20). Falls knew Paglianite told Coveney he should not be available for Costanzo's subpoena. Coveney was never served with the Costanzo subpoena and never appeared at the trial. (PX 37).

On January 5, 1978, during the trial, Paglianite told Falls that appellant's trial attorney had been suspended in New York for three years. (IV, p. 17; PX

29, p. 88). The next day counsel for the government informed the trial judge of the suspension.

FBI Agent Mackey said that Paglianite told him in March 1977 that Costanzo owed him $35,000 in back legal bills, which he was paying off. (III, p. 122). Falls reported to Mackey that Paglianite told him Costanzo had given him and his law partner a bad check. (PX 30, p. 14).

In October 1977 Paglianite called Agent Mackey and offered to "pump Costanzo for information." Paglianite stated he would provide the information to the FBI. Two months later, on December 8, 1977, Agent Mackey wrote a memo that he terminated his contact with material witness Paglianite because of the conflict with Costanzo, who was awaiting trial. Agent Falls, stationed in the Judicial District and FBI office from which Costanzo was being prosecuted did not terminate his

contact with Paglianite.

Though heavily redacted, the hundreds of pages of FBI memos reflecting information provided about Costanzo by Paglianite show constant contact between Paglianite and Costanzo throughout 1977, from the indictment to the trial and during the trial. Illustrative is a memo dictated November 17 from an interview Agent Falls had with Paglianite, in which Paglianite reported he was "with A.J. Costanzo all during the daylight hours of November 17, 1977." (PX 28, p. 39). The FBI knew Costanzo gave Paglianite money on a number of occasions and that Paglianite said he had represented Costanzo as a lawyer in the past. The FBI engaged in physical surveillance in which Falls participated and in which the informants were wired. (e.g. PX 28, p. 21).

Documentary evidence established that Paglianite had represented Costanzo as his

lawyer in both criminal and civil matters during the mid and late 1970s. (PXs 6-26; 27, p. 59). On September 3, 1977, several weeks before his indictment, Costanzo signed a check drawn on Frenchtown Villa, Inc. in the amount of $10,000, payable to and delivered to Paglianite. (PX10). Costanzo said it was a fee for the impending indictment in this case. (II, p. 56). On October 29, 1977 Paglianite reported to Agent Falls that Costanzo had received $20,000, and he "gave money to Attorney Frank A. Paglianite via check." (PX 29, p. 58).

Paglianite was present at Costanzo's initial appearance in federal court on these charges and at a bail hearing in State Court on the related state charges, where he arranged bail (District Court opinion, A-23). The FBI knew it. (III, pp. 99-100, 155). Other meetings between Paglianite and Costanzo throughout

the period are reflected in FBI memos. Paglianite called Agent Falls the night before the jury verdict, January 12, 1978, to report he met Costanzo at the Bayway Diner in Elizabeth that night. (PX 29, p. 90).

Paglianite called Agent Falls at 11:30 p.m. on January 14, 1978, the night after Costanzo's conviction, to report Coveney had called Costanzo at 1:00 a.m. that morning "to taunt him." (PX 29, p. 94).

The District Court found "Costanzo's testimony is very difficult to credit." A-21. It placed "no credence" in reports by Costanzo and his attorney, Seffern, that they talked with Paglianite on the telephone during the trial "but, even if the calls occurred, nothing harmful was relayed that I can discern." A-24. Of course, the FBI memos confirm that there were numerous communications during the trial.

Mr. Paglianite also participated in Costanzo's selection of counsel for the trial. He set up the meeting between Costanzo and Warren Wilentz after which Costanzo retained Wilentz. (II, pp. 63-64). The trial judge later recalled that Mr. Wilentz withdrew during a conference in chambers with Costanzo absent because the government was prepared to move to disqualify him. (Record on Prior Appeal, p. 1452a). Just weeks before the trial, as a result of Wilentz's withdrawal, Costanzo was without counsel. He called Paglianite who contacted lawyers for him and then accompanied him to New York where they met John Seffern who Costanzo retained the next day.

Mr. Seffern informed Costanzo that he had a two-year suspension in a State Court but was in good standing in Federal Court. In fact, Mr. Seffern had been suspended in 1974 from practice in

Wisconsin state court where he was originally admitted for non-payment of dues and in New York state courts in 1976 for commingling funds.

At the time of the trial because of administrative error, Mr. Seffern remained in good standing in the United States Court of Appeals for the Second Circuit and with Southern and Eastern Districts of New York. He was subsequently suspended in these courts.

After Mr. Paglianite advised Agent Falls that Mr. Seffern was suspended from practice during the trial and the government brought the matter to the Court's attention the next day, the District Judge asked Mr. Seffern about the matter. Mr. Seffern told the District Judge he was in good standing in Wisconsin. This was not true.

Costanzo, Seffern and Purcell all testified they believed their conversa-

tions with Paglianite were confidential. All knew of Costanzo's long, close relationship with Paglianite. All believed Coveney's testimony was important to the defense. None knew that Paglianite was an informant for the FBI until long after the trial.

Neither Paglianite nor Coveney testified in the hearing below.

REASONS FOR GRANTING THE WRIT

1. The government through its attorney-informer intentionally invaded the defense camp in violation of petitioner's Sixth Amendment right to assistance of counsel.

This is a case of first impression and profound importance to the role and obligations of lawyers and government agents. No other reported decision involves the extensive use of an actively practicing attorney as an informer by any federal or state law enforcement agency. No reported decision involves an attorney-informer actually communicating trial-related information which he received in the course of a confidential relationship with a defendant in a federal criminal case.

To permit a practicing lawyer and government agents to maintain an active informer relationship over a period of many months during which the lawyer informs regularly on a person he has repre-

sented is to imperil all the protection sought from the Sixth Amendment right to counsel, from the Fourth Amendment prohibition against unreasonable searches and the Fifth Amendment guarantee of due process of law.

Thirty-two years ago the United States Court of Appeals for the District of Columbia,in a case in which an informer assisted in the preparation of the defendant's case and reported back to the government, said:

> The Constitutions's prohibitions against unreasonable searches, and its guarantees of due process of law and effective representation by counsel, lose most of their substance if the Government can with impunity place a secret agent in a lawyer's office to inspect the confidential papers of the defendant and his advisors, to listen to their conversations, and to participate in their counsels of defense. Conduct of that sort on the part of our Government is no doubt extremely rare. But if it does occur a conviction tainted by it cannot stand. Caldwell v. United States, 205 F.2d 879 at 881 (D.C. Cir. 1953), cert. denied, 349 U.S. 930 (1955).

See also Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951), at 759: "The prosecution is not entitled to have a representative present to hear the conversations of accused and counsel."

When the informer is an attorney who has represented the defendant, who has helped select trial counsel and who discusses the case constantly with defendant, his trial counsel and his investigator, the risks are even greater.

Attorney Frank Paglianite, who had represented Costanzo for years, informed the FBI about Costanzo's conduct on hundreds of occasions beginning before and continuing into the period when the alleged criminal acts occurred, during the months of the FBI investigation, at the time of Costanzo's arrest and arraignment, throughout the post indictment trial preparation period and while the trial was in progress. Paglianite had dinner with Costanzo the night before the jury verdict, which he dutifully related to the

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FBI, and he called at 11:30 p.m. the night after the guilty verdict to inform the FBI that another FBI informer, Charles Coveney, who Costanzo had vainly sought as a witness, phoned Costanzo to "taunt" him at 1:00 a.m. after the guilty verdict.

Among the known and critical information Paglianite passed to the FBI was the fact that its principal witness against Costanzo, FBI agent Jumonville, had been secretly tape recorded by Costanzo. Paglianite also passed on the fact that Costanzo's trial attorney was disbarred in New York. He forewarned that the defense would subpoena Coveney, an effort that failed because the FBI did not require its informer, who told them he was "dodging" the subpoena, to accept service, as he had a duty to do.

FBI Agent Mackey, stationed in New York, for whom Mr. Paglianite had offered to "pump" Costanzo for information,

terminated his contract with material witness Paglianite because he realized that there was a conflict while Costanzo was under indictment and awaiting trial. Agent Falls, however, assigned in the Judicial District and FBI office in which the investigation, indictment, and trial took place, continued to receive reports from Paglianite through the end of the trial.

Thus, the government knew its informer was in direct and frequent contact with the defense camp. When it continued to accept reports from its informer about meetings with Costanzo it must be assumed to have intended to place its informant in the defense camp as a matter of law.

The Supreme Court has acted with great care to protect the privacy of a defendant's communications with his counsel and his trial strategy from government intrusion.

In Black v. United States a monitoring device installed in an unrelated criminal investigation had incidentally and briefly recorded hotel room conversations between Black and his lawyer. Tax Division lawyers prosecuting Black and ignorant of the source, found nothing in the FBI reports or memoranda which they considered relevant to the tax evasion case. The Supreme Court observing it had "never been disposed to vacate convictions without adequate justification" nevertheless remanded the case for a new trial. Black v. United States, 385 U.S. 26, at 29 (1966).

In O'Brien v. United States, petitioner was overheard in two brief conversations while he happened to be in a commercial establishment owned by an acquaintance who was under FBI investigation. In one conversation, O'Brien asked one of his attorneys to file an applica-

tion relating to the territorial limitations in his bail conditions. The other conversation concerned his trial, but no lawyer was present. The conversations were recorded and summarized in logs made from the tapes. They were not communicated in any manner outside the FBI, nor were the contents communicated to attorneys for the Department of Justice, including those who prosecuted the case. The Supreme Court vacated the judgment and remanded the case "for a new trial should the Government seek to prosecute petitioner anew." O'Brien v. United States, 386 U.S. 345 (1967).

In Weatherford v. Bursey, 429 U.S. 545 (1977), there was no continuing receipt of reports from the informer co-defendant. Indeed, the informer had from the beginning told his co-defendant he would seek a separate trial. On two occasions only, and both prior to the trial,

the informer met with his co-defendant and co-defendant's counsel and the approaching trial was discussed. He sought no information. He did not seek or ask for the meeting. He did not pass on or discuss any information about the co-defendant's trial plans, strategy or anything having to do with the pending criminal action.

In stark contrast attorney-informer Frank Paglianite was known by Agent Falls to be in constant contact with Costanzo and was submitting regular reports by telephone before and during the trial. He had suggested pumping Costanzo for information and was not always believed by his supervising agents. Agent Falls' admonition to Paglianite not to pass on any information he might obtain about the trial, if credible and enforceable, gives no constitutionally required breathing room to the confidences of coun-

sel and trial strategy. The government knew, accepted and intended Paglianite's intrusion into Costanzo's defense camp.

2. The government's attorney-informer disclosed confidential strategy information gained from his intrusions into the defense camp in violation of petitioner's Sixth Amendment right to the Assistance of Counsel.

Attorney-informer Paglianite reported to FBI agents about criminal defendant Costanzo on hundreds of occasions in a wide-ranging fashion providing information that was recorded in memorandums prepared by the agents that directly and significantly related to the trial and defendant's trial strategy. Having offered to pump Costanzo for information, Paglianite continued regular reporting about his meetings with Costanzo through the trial and after the jury verdict. While the Courts below have found that no disclosures resulted in a

Sixth Amendment violation, they err as a matter of law. Even as to such critical fact-finding as whether there was an attorney-client relationship between Costanzo and Paglianite during the pretrial and trial period the Court of Appeals concedes "the evidence relied on by the district judge is far from overwhelming." (A-5). There was, of course, substantial evidence that Costanzo was paying for and receiving Paglianite's legal advice.

There is, however, no doubt that the FBI was informed by Paglianite and by Coveney that Costanzo was trying to subpoena Coveney. Even if it is believed a December 3 memo which referred to Paglianite's report that Costanzo intended to "get" Coveney was not understood to mean to testify at the trial, Agent Falls as the Court of Appeals recognizes reported he was told by Coveney that Costanzo was trying to subpoena

him. A-8. Aside from Agent Falls condoning evasion of the subpoena and the significance of the government knowing who a defense witness might be, the government was clearly alerted that Agent Jumonville, the principal government witness, might be challenged by Costanzo using Coveney to prove the content of a meeting between them that Coveney witnessed.

For the government to learn from its informer in the defense camp that Costanzo had tape recorded meetings with Agent Jumonville was significant to its case. Even if as the Court of Appeals states, the government knew of some tape recordings and was not informed by the disclosures of the significance of the tapes or use to which they might be put, see A-10, mere knowledge that the defense was discussing the tapes was a violation of the privacy of the defense camp and its

strategy which could clearly benefit the government.

It received direct information that the tapes were discussed and therefore presumably under consideration and considered significant. Agent Jumonville would be alerted to assume his testimony might be challenged by a tape recording of his own voice and to prepare his testimony accordingly.

The disclosure to the FBI by Paglianite that Mr. Seffern's license to practice law was suspended was confidential information learned in the defense camp and was used the next day by the government in court in a way that may well have undermined Mr. Seffern's self-confidence and zealousness. Indeed, because he did not tell the truth in court about his suspension in Wisconsin, the effectiveness of his assistance was dangerously undermined.

The known transmission of confidential defense strategy information violated Costanzo's Sixth Amendment rights. Weatherford v. Bursey, 429 U.S. 545 (1977).

3. The intrusion into the defense camp is so pervasive as to violate petitioner's Sixth Amendment right without a showing of prejudice.

The intrusion into the defense camp revealed in the record here is unprecedented in its scope, frequency, and duration. It is clear that attorney informant Paglianite met directly and frequently with Costanzo and in the weeks before and during the trial with Costanzo's trial lawyer and investigator. Paglianite could and did meet with Costanzo whenever he wanted to and discussed whatever he wanted to. He reported his meetings with Costanzo to the FBI on hundreds of occasions and at least some of the content of hundreds of these reports was recorded in memos filed by FBI agents.

The dangers of receiving impermissible information under such circumstances are too great to permit the practice. While one FBI Agent had the good though belated judgment to terminate his contacts with Paglianite as the trial approached, the agent in the office and District prosecuting the case continued the relationship. In United States v. Levy, the United States Court of Appeals for the Third Circuit has described some of the dangers of seeking to police rather than prohibit intrusion:

> Where there is a knowing invasion of the attorney-client relationship and where confidential information is disclosed to the government, we think that there are overwhelming considerations militating against a standard which tests the sixth amendment violation by weighing how prejudicial to the defense the disclosure is. In this case a government attorney, sensitive to her obligation to prevent sixth amendment violations by agents of the United States, called the matter to the district court's attention. Consequently, the court was able to consider the problem in a pre-trial

> hearing. But it is highly unlikely that a court can, in such a hearing, arrive at a certain conclusion as to how the government's knowledge of any part of the defense strategy might benefit the government in its further investigation of the case, in the subtle process of pretrial discussion with potential witnesses, in the selection of jurors, or in the dynamics of trial itself. Moreover we know from the Rispo case that not all government attorneys can be counted on to act with the same punctilio as did Attorney Fields. In addition, the record here indicates the substantial risk that case agents of law enforcement agencies like the DEA, who actually work up the cases and assist government counsel at trial, might not even disclose to the government attorneys that certain information was obtained from the defense by an informer. In such cases the sixth amendment violations might be disclosed, if at all, late in the trial or after the trial had been completed. At that point a trial court applying an actual prejudice test would face the virtually impossible task of reexamining the entire proceeding to determine whether the disclosed information influenced the government's investigation or presentation of its case or harmed the defense in any other way. United States v. Levy, 557 F.2d 200, 208 (3rd Cir. 1978).

The Court's commitment to the integrity of the Sixth Amendment right to

counsel and the adversary system is shown by its disposition:

> Since in this case an actual disclosure of defense strategy occurred and since we reject the proposed rule that the damage done by such disclosure should be weighed on a case-by-case basis, we must consider what remedy is appropriate. In our judgment, the only appropriate remedy is the dismissal of the indictment. United States v. Levy, at 210.

The threat of prejudice to Sixth Amendment rights arising from the use of a practicing attorney as an informant is always substantial. Where an attorney had advised a defendant in the past, is being paid by the defendant, is known to be in constant contact with the defendant, reports over two hundred communications with the defendant including dozens after the indictment and meets with defendant and reports during the trial, the intrusion into the defense camp and the threat of prejudice is far too pervasive and substantial to tolerate. In United

States v. Morrison, 449 U.S. 361 (1981), two meetings between federal agents and the defendant without her retained counsel being present were held not so inherently prejudicial as to require a dismissal without demonstrating prejudice. But the Supreme Court specifically recognized that the substantial threat of prejudice may require dismissal. United States v. Morrison, supra, at 365. This is such a case.

The rights slowly developed in historic cases like Powell v. Alabama, 287 U.S. 45 (1932); Johnson v. Zerbst, 304 U.S. 458 (1938); Glasser v. United States, 315 U.S. 60 (1942); Gideon v. Wainwright, 372 U.S. 335 (1963); and Argersinger v. Hamlin, 407 U.S. 25 (1972) are of little value if the government can invade the privacy of communication with counsel. "The right to have the assistance of counsel is too fundamental

and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60, at 76.

4. Under all the circumstances of this case petitioner was denied his Sixth Amendment Right to Assistance of Counsel.

The District Court ruled that Costanzo was denied effective assistance of counsel and had no representation in fact because his trial counsel, Mr. Seffern, was suspended from practice. See the District Court's orders, A-34 at A-36 and A-44, and its opinions, A-18 and A-37. Trial counsel was suspended in all state courts and would have been suspended in all federal courts as well except for administrative errors by the courts.

Mr. Seffern's effectiveness was questionable for a number of reasons. He

came into the case very late and a continuance was denied. He had not been engaged in a trial practice for some time before this matter. He was relying in part on the assistance of attorney-informer Paglianite who was not reliable and was frustrating the defense by helping informer Coveney avoid service of a subpoena. When asked by the District Court about his suspension the day after Paglianite informed the FBI about it, Mr. Seffern falsely told the court he was in good standing in Wisconsin. Knowing of the peril he had placed himself in, he could not be reasonably expected to zealously defend Costanzo.

Paglianite, the government's attorney-informer, in fact chose both attorney Warren Wilentz and John Seffern for Costanzo. He briefed prospective attorneys about the case. He presumably knew that Mr. Wilentz could not try the

case because of a conflict. This deprived Costanzo of assistance of counsel at a time that would have permitted full preparation and effective representation. Paglianite knew from the first meeting with Seffern that he had not practiced recently and was under some suspension, yet the matter was brought to the government's attention only after the trial began.

The invasion of the defense camp was pervasive and involved not just disclosures of information, but disruptive activity as well, by a government attorney informant who helped choose an unlicensed attorney for the defendant. It seems clear from the record that it was Paglianite's desire to impress Agents Falls and Mackey and avoid prosecution himself that motivated his conduct. Under all of these circumstances, the government's use of Paglianite violated

Costanzo's right to the effective assistance of counsel. See, Illinois v. Gates, 462 U.S. 213 (1983).

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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Counsel of Record

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Attorneys for Petitioner

January 24, 1985

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-5767, 83-5233, 83-5341/42

UNITED STATES OF AMERICA
Appellant in No. 83-5233

v.

ANTHONY J. COSTANZO

Anthony J. Costanzo, Appellant
in Nos. 82-5767, 83-5341/42

Appeal from the United States
District Court for the
District of New Jersey

D.C. Crim. No. 77-383-01

Argued: February 28, 1984

Before: SEITZ and GARTH, *Circuit Judges*,
and DIAMOND, *District Judge**

(Opinion Filed: July 26, 1984)
Amended: August 6, 1984

Ramsey Clark (Argued)
Lawrence W. Schilling
113 University Place
New York, N.Y. 10003
Attorneys for
Appellant-Cross-Appellee,
Anthony J. Costanzo

---

*The Honorable Gustave Diamond, United States District Judge for the Western District of Pennsylvania, sitting by designation.

W. Hunt Dumont
U.S. Attorney
Samuel Rosenthal (Argued)
Chief, Appeals Division
Federal Building
970 Broad Street
Newark, N.J. 07102
Attorneys for
Appellee-Cross-Appellant,
United States of America

OPINION OF THE COURT

SEITZ, *Circuit Judge.*

This case presents an appeal and a cross-appeal from an order of the district court granting petitioner Anthony Costanzo's motion for relief under 28 U.S.C. § 2255. Petitioner moved to dismiss the indictment or in the alternative for a new trial, but the district court granted only a new trial. While the district court did not explicitly refuse to dismiss the indictment, this was the effect of its order and we will so consider it. Petitioner appeals the implied refusal to dismiss the indictment, while the government cross-appeals the grant of a new trial. Both provisions of the order are appealable under section 2255. *See United States v. Allen*, 613 F.2d 1248 (3d Cir. 1980).

I

Petitioner was convicted in 1978 of conspiracy to possess and possession of stolen treasury checks. On petitioner's direct appeal this court affirmed his conviction without an opinion. *United States v. Costanzo*, 591 F.2d 1337 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979). Petitioner subsequently sought relief under section 2255 and Rule 33 of the Federal Rules of Criminal Procedure. The trial judge denied relief

without holding a hearing. On appeal this court remanded for an evidentiary hearing on two of the grounds for relief raised by petitioner. *United States v. Costanzo*, 625 F.2d 465, 470 & n.3 (3d Cir. 1980). The first was whether at the time of petitioner's trial an attorney-client relationship existed between petitioner and Frank Paglianite, an informer who provided information about petitioner to the FBI. The second was whether petitioner lacked assistance of counsel at trial because his trial counsel was suspended from the New York bar at the time of the trial. Although not clearly part of the remand, the district court also heard evidence on whether, apart from the existence of an attorney-client relationship, Paglianite's informer status or the disclosures by him violated petitioner's sixth amendment rights.

At the hearing on remand the district court permitted plaintiff to raise two additional grounds for relief: first, that the government failed to make exculpatory evidence available in violation of the Jencks Act, 18 U.S.C. § 3500, and *Brady v. Maryland*, 373 U.S. 83 (1963); and second, that petitioner was denied effective assistance of counsel because he was denied a continuance prior to trial. The district court found no basis for relief on either of these grounds, and neither do we.

Addressing the first ground for the remand identified by this court, the district court found that there was no attorney-client relationship between petitioner and Paglianite during the critical phase. The district court also determined that nothing in Paglianite's informer status or the disclosures by him affected petitioner's sixth amendment rights. When it turned to the second ground for the remand, however, the district court held that petitioner had lacked "representation in fact" at trial, and that a new trial was the appropriate remedy. These appeals followed.

II

A. Attorney-Client Relationship

We turn first to petitioner's appeal from the refusal to dismiss the indictment. Petitioner alleges that Frank Paglianite, who until 1982 was a member of the New Jersey bar, was acting as petitioner's attorney while at the same time informing the FBI of the substance of confidential attorney-client conversations. The district court found that an attorney-client relationship had existed between petitioner and Paglianite but that it had ended some time prior to petitioner's trial in January, 1978. Petitioner argues that the district court erred in finding that there was no attorney-client relationship. The district court's conclusion is a finding of fact, reviewable by the clearly erroneous standard.

Petitioner testified that when he learned that he was about to be indicted, he gave Paglianite a check for $10,000 as a retainer for Paglianite's services at trial. A check for $10,000 signed by petitioner and made out to and endorsed by Paglianite was admitted into evidence at the § 2255 hearing. Petitioner also testified that after petitioner's arrest on federal and state charges, Paglianite attempted to enter an appearance in state court on behalf of petitioner and his co-defendants, and that the state trial judge refused to allow the multiple representation. According to petitioner, Paglianite then declined to enter an appearance on behalf of any one defendant in both the state and federal proceedings. Instead, he decided that each defendant would retain his own counsel and that he would work with all the co-defendants. Petitioner further testified that at two group meetings Paglianite discussed trial strategy with all the co-defendants. Finally, both petitioner and his trial counsel testified that on numerous occasions prior to and during

petitioner's trial they discussed trial strategy and other matters with Paglianite, with the expectation that Paglianite was assisting with petitioner's defense and that their conversations with him were confidential.

The district judge found that petitioner had not paid Paglianite for legal services for some time prior to the trial. He also found that petitioner's dealings with Paglianite near the trial date were of a business nature, and included an elaborate scheme to defraud Citibank. Finally, he found that Paglianite had never entered an appearance for petitioner at his criminal trial. The district judge presumably declined to credit petitioner's testimony that he believed that Paglianite was assisting him with his defense at trial. Indeed, the trial judge stated that he "could not credit very much of Costanzo's testimony" on whether he had an attorney-client relationship with Paglianite. While the evidence relied on by the district judge is far from overwhelming, we cannot say that his finding that petitioner had no attorney-client relationship with Paglianite at the time of his trial was clearly erroneous.

B. Did Paglianite's informer status or the disclosures by him violate petitioner's sixth amendment rights?

Upholding the district court's conclusion that no attorney-client relationship existed does not end our inquiry. The sixth amendment is also violated when the government (1) intentionally plants an informer in the defense camp; (2) when confidential defense strategy information is disclosed to the prosecution by a government informer; or (3) when there is no intentional intrusion or disclosure of confidential defense strategy, but a disclosure by a government informer leads to prejudice to the defendant. *See, e.g., Weatherford v. Bursey*, 429 U.S. 545 (1978). We will review the district court's findings to determine

whether the three branches of the *Weatherford* test were correctly applied to the facts of this case.

The district court found that no intentional intrusion into the defense camp occurred. Petitioner does not challenge this finding in so many words, but argues that dismissal of the indictment is warranted by the frequency of Paglianite's meetings and telephone conversations with petitioner and his trial counsel, and the frequency of Palgianite's reports to the FBI. We read this argument as an attack on the finding that there was no intentional intrusion by the government.

The district judge noted that Paglianite informed the FBI agents that he was no longer representing petitioner and would not represent him in this case. He also noted that the FBI agents instructed Paglianite not to disclose any defense strategy information and that they periodically consulted with their supervisors to make certain that their use of Paglianite remained within legal limits. In view of these facts the district court's finding that the government did not intentionally invade confidential attorney-client conversations is not clearly erroneous.

We next turn to the disclosures made by Paglianite to determine whether the second or third branches of the *Weatherford* test apply. The district court found that four of Paglianite's disclosures were relevant to petitioner's trial, which commenced on January 3, 1978:

> (1) On December 2, 1977, Paglianite told an [FBI] agent that one private detective was to "get" another;
>
> (2) On December 22, 1977, Paglianite reported that Costanzo was taping a federal agent;
>
> (3) On December 13, 27 and 29, 1977,

Paglianite informed an agent that Costanzo was attempting to bribe him to file a false affidavit; and

(4) In early January 1978 Paglianite informed an agent that Costanzo's lawyer, John Seffern, had been suspended from practicing law in the State of New York.

United States v. Costanzo, Slip Op. at 4 (D.N.J. Nov. 17, 1982) (unreported).

The district court found that none of these disclosures "had any impact on the trial, as far as I am able to discern," and that none of them had "impinged on petitioner's sixth amendment rights." We treat this language as a finding that no confidential defense strategy was disclosed, and that the disclosures did not result in prejudice. Petitioner attacks the district court's conclusion. We now consider whether the four disclosures identified by the district court involved confidential defense strategy and, if not, whether petitioner has shown that they led to prejudice. Both determinations are questions of fact which we review under the clearly erroneous standard.

The December 2 disclosure

Paglianite informed the FBI, according to the FBI's file, that petitioner "is looking for HARRY THE HAT [PURCELL] to 'get' CHARLES COVENEY, Summitt, New Jersey." Coveney was an FBI informant and a friend of FBI agent Jumonville, one of the principal government witnesses at petitioner's trial. Coveney was also acquainted with petitioner, who had once hired Coveney as an investigator. Coveney also knew Paglianite. In fact, petitioner testified that occasionally during telephone discussions of his trial with Paglianite, Coveney would pick up the telephone and

join the conversation. He also testified that he believed that throughout the criminal trial Coveney was staying at Paglianite's house.

Petitioner asserts that he wanted Coveney to testify at his trial that Jumonville offered petitioner immunity in exchange for information in aid of another FBI investigation. Petitioner maintains that the December 2 disclosure informed the government of his intent to subpoena Coveney, and that the FBI responded by helping Coveney avoid being subpoenaed. Thus, petitioner argues that the district court erred in not finding a disclosure of confidential defense strategy.

We conclude that the district court's finding that the December 2 disclosure did not involve confidential defense strategy is not clearly erroneous. The record contained ample evidence supporting the district court's conclusion that the statement about "getting" Coveney did not refer to an attempt to subpoena him as a witness. For example, the FBI agent who took the call from Paglianite testified that he did not believe when he took the call that Paglianite was talking about petitioner's upcoming trial, and did not know at the time that Purcell was an investigator working for petitioner. He also testified that he connected the statement "'get' Charles Coveney" with threats which, according to Paglianite, were made by petitioner to "do Mr. Coveney in."

The record also shows that while the disclosure occurred on December 2, no subpoena for Coveney was issued until December 16, and Purcell testified that he was not given the subpoena to serve until just prior to the trial. FBI agent Falls testified that he was not aware of an attempt to subpoena Coveney until Coveney told him toward the end of the first week of January. Finally, petitioner's trial counsel testified that it was during the trial that he asked Paglianite for help in locating Coveney so that the subpoena could be served.

On the basis of this record evidence we will uphold the district court's finding that Paglianite's December 2 call to the FBI did not disclose confidential defense strategy.

It remains to apply the third branch of the *Weatherford* test to the December 2 disclosure to see whether the disclosure prejudiced petitioner. We believe that the district court's finding that there was no prejudice is supported by the record evidence showing that the FBI did not understand the December 2 disclosure to relate to an attempt to subpoena Coveney, that such an attempt did not occur until January, that petitioner knew of Coveney's whereabouts, and that Paglianite was not informed of the attempt to subpoena Coveney until January. Since the December 2 disclosure was not of confidential defense strategy and did not result in any prejudice, it was not the basis of a sixth amendment violation.

The December 22 disclosure

The FBI files reveal that on December 22, 1977, Paglianite and Coveney called petitioner, who told them he had taped FBI agent Jumonville, and that Paglianite and Coveney then called FBI agent Falls to pass on the information. Again, the district court found nothing in this disclosure that violated petitioner's sixth amendment rights. Petitioner argues that this disclosure concerned the taping of an April 5, 1976, meeting with FBI agent Jumonville at which petitioner claims he was offered immunity from prosecution in exchange for providing information to the FBI. Petitioner asserts that he had intended to use the tape at trial to impeach Jumonville's testimony that he never offered petitioner immunity, and that the disclosure compromised this confidential defense strategy.

We agree with the district court that the December

22 disclosure to the FBI did not violate petitioner's sixth amendment rights. The information relayed to FBI agent Falls was that petitioner "had tape recorded" meetings with Jumonville. There had been a number of meetings between petitioner and Jumonville, and at least one of the meetings prior to April 5, 1976, had been taped with Jumonville's knowledge. Furthermore, the December 22 disclosure contained no specific reference to the April 5, 1976, meeting, which is the only one petitioner argues is relevant. Nor is there any reference to petitioner's intended use for the tape. Thus, all the information that was contained in the December 22 disclosure --that petitioner "had tape recorded" Jumonville-- had been known to the government for a long time. The significance of the April 5 meeting and the use to which the tape recording would be put were not revealed. Under these circumstances the district court's finding that confidential defense strategy was not revealed was not clearly erroneous, and therefore we will uphold it. Turning to the third branch of the *Weatherford* test, we note that petitioner has not argued that actual prejudice resulted from the December 22 disclosure. Petitioner has therefore not shown the existence of a sixth amendment violation under either the second (disclosure of confidential trial strategy) or third (disclosure resulting in prejudice) branch of the *Weatherford* test.

The disclosure of petitioner's attempts to bribe Paglianite

The revelation that petitioner offered to bribe Paglianite to file a false affidavit is information involving a prospective crime, and would not be privileged even if an attorney-client relationship existed between petitioner and Paglianite. No sixth amendment violation arose from this disclosure.

The disclosure of Seffern's suspension

Late on the evening of January 5, 1978, after the third day of petitioner's trial, Paglianite disclosed to FBI agent Falls that John Seffern, petitioner's trial counsel, was suspended from practice in New York. This disclosure does not involve confidential defense strategy, and thus cannot violate the sixth amendment absent a showing of prejudice. Petitioner attacks the quality of Seffern's representation, *see infra* part III, but he does not claim prejudice from the mere disclosure of Seffern's status. It follows that this disclosure did not result in a sixth amendment violation.

Petitioner contends that we must find, based on this court's opinion in *United States v. Levy*, 577 F.2d 200 (3d Cir. 1978), that Paglianite's disclosures violated his sixth amendment rights. *Levy* held that prejudice, and thus a violation of the sixth amendment, will be presumed to occur when confidential defense strategy is disclosed to the government by an informer. However, we have upheld the district court's finding that none of Paglianite's disclosures involved petitioner's confidential defense strategy. We therefore conclude that the *Levy* rule does not apply to petitioner's case.

None of the disclosures found by the district court were the product of intentional intrusion into the defense camp, involved confidential defense strategy information, or were accompanied by a showing of prejudice. We therefore hold that the district court correctly refused to dismiss the indictment on the ground that Paglianite's disclosures resulted in a sixth amendment violation.

III

We turn next to the government's cross-appeal from the order granting petitioner a new trial on the

ground that he had no "representation in fact" as a result of his trial counsel's suspension.

The relevant facts are as follows. After Paglianite declined to represent petitioner at his trial, petitioner secured the services of Warren Wilentz. Wilentz withdrew from the case before trial because of a conflict of interest involving a government witness who was a former client. Petitioner, with Paglianite's help, thereafter secured the services of John Seffern. Seffern had at one time been a member of the Wisconsin and New York bars, but he was suspended from practice in the Wisconsin state courts in 1974 for nonpayment of dues and in the New York state courts in 1976 for commingling funds. At the time of petitioner's trial Seffern was a member in good standing of the bars of the United States District Courts for the Southern and Eastern Districts of New York and of the Court of Appeals for the Second Circuit. When petitioner, Paglianite and Seffern discussed whether Seffern would take the case, Seffern told petitioner and Paglianite about his suspension in New York and his being in good standing in the federal courts. Petitioner answered, according to his testiony at the hearing, "Well, if he's okay in federal court, it's okay with me."

It appears that no motion to admit Seffern *pro hac vice* was made at the beginning of petitioner's trial. On the fourth day of trial, the day after Paglianite disclosed Seffern's suspension to the FBI, counsel for the government informed the trial judge of the suspension. At the end of the day, after the jury had gone, the trial judge inquired into Seffern's standing. Seffern informed the judge that he was in good standing in the Wisconsin state courts, in the Southern and Eastern Districts of New York, and in the United States Court of Appeals for the Second Circuit.[1] The trial judge found

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1. Seffern was not telling the truth when he told the district judge who presided over petitioner's trial that he was in good

on the basis of these bar memberships that Seffern qualified for admission *pro hac vice* under Local Rule 4(c). The district judge who presided over the hearing on petitioner's § 2255 petition concluded that Rule 4(c) did not permit a suspended attorney to serve *pro hac vice* in the district court and that the trial judge should not have admitted Seffern, "with the result that [petitioner] in reality had no representation in fact."

An initial question is the standard of review which we should apply to the district judge's holding that Seffern should not have been admitted *pro hac vice*. Rule 4(c) provides that the decision to admit an attorney *pro hac vice* is committed to the discretion of the trial judge. In this case, however, we are reviewing not a trial judge's decision to admit such counsel, but rather the holding by the district judge at the § 2255 hearing that the trial judge should not have permitted Seffern to try petitioner's case *pro hac vice*. Since we are in the same position as the judge at the § 2255 hearing to apply the standards of Rule 4(c) to the trial judge's decision to admit Seffern, a deferential standard of review is not necessary. Accordingly, our review is plenary.

At the time of petitioner's trial Rule 4(c) of the Rules of the United States District Court for the District of New Jersey provided as follows:

> Any member in good standing of the bar of any court of the United States, or of the highest court of any state, who is not [a member of the New Jersey bar], may in the discretion of the court, on motion, be permitted to appear and participate in a particular case . . . .

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standing in Wisconsin. The district judge who presided over the § 2255 hearing placed no reliance on this factor in holding that Seffern should not have been admitted. In the present context we do not consider this factor to be important.

The district judge who presided at the § 2255 hearing interpreted the then-existing rule to prohibit Seffern from being admitted *pro hac vice* at petitioner's criminal trial because he viewed suspension from the bar of a federal court as being the automatic consequence of a state suspension. In other words, he believed that Seffern was automatically suspended from the federal courts in New York when he was suspended from the New York bar, and that the federal courts in New York had simply not yet recognized that fact at the time of petitioner's trial. We believe, on the contrary, that under the plain wording of Rule 4(c) Seffern was eligible for admission *pro hac vice*, and that treating him as constructively suspended in the federal court was not warranted as a matter of law.

Nor can we find another rationale for upholding the district judge's conclusion that petitioner had no "representation in fact." This is not a case involving representation by one without legal training or who was not a member of any bar. Nor is it significant that Seffern does not appear to have been formally admitted *pro hac vice* until the end of the fourth day of trial. As long as one is represented by an attorney who could have been admitted *pro hac vice* at the beginning of the trial, the failure to be formally admitted does not raise sixth amendment concerns. *Derringer v. United States*, 441 F.2d 1140, 1141 (8th Cir. 1971); *United States v. Bradford*, 238 F.2d 395, 397 (2d Cir. 1956), *cert. denied*, 352 U.S. 1002 (1957).

The district judge interpreted Rule 4(c) as then worded as not permitting an attorney suspended in another jurisdiction to be admitted *pro hac vice*. We read the rule otherwise. The plain wording of the rule leaves it a matter for the exercise of discretion by the district judge, and the law does not compel that discretion to be exercised against admission in the event that an attorney is suspended in the courts of his

home state. Although the interpretation of the local rules of a district court by one of its judges is entitled to deference by this court, we cannot agree that the rule as then formulated fairly permitted the interpretation placed on it by the district court.[2]

Petitioner argues that a finding that he had no "representation in fact" is compelled by Judge Adams's dissenting opinion in *United States v. DeFalco*, 644 F.2d 132, 141 (3d Cir. 1979) (in banc) (Adams, J., dissenting), to which the district court's attention was called in our prior opinion remanding this case for an evidentiary hearing. In *DeFalco* the court was faced with a situation where counsel for the defendant-appellant had been suspended from the bar of the district court after pleading guilty to a crime. The attorney had plea bargained with the same federal prosecutors whom he was opposing in the appeal to this court.

Judge Adams's position was that DeFalco's attorney was automatically suspended from the bar of the court of appeals when he was suspended in the district court, so that the appellant was without assistance of counsel during his appeal. Other considerations aside, we need not follow the position taken by Judge Adams in his *DeFalco* dissent. While Judge Adams believed that suspension in the court of appeals was automatic after a district court suspension, relying on Fed. R. App. P. 46(a), it is clear from our interpretation of Rule 4(c) that suspension is not automatic under the facts in our case.

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2. We note that this problem should not occur again because Rule 4C was recently amended to prohibit the admission *pro hac vice* of an attorney who is under suspension from the bar of any state or federal court.

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Petitioner next argues that he was denied effective assistance of counsel because of Seffern's suspension. Petitioner contends that Seffern was subject to a conflict of interest because if he presented a vigorous defense, there was a possibility that the government would investigate him, discover the suspension, and leave him open to unspecified sanctions. Alternatively, petitioner argues, there was such a possibility of a conflict of interest that representation by Seffern cannot be permitted.

Petitioner points to no specific acts of counsel which prejudiced him at trial. In a conflict of interest situation prejudice will be presumed only if the defendant proves that his counsel "actively represented conflicting interests" and "that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348-50 (1980); *see also Strickland v. Washington*, 52 U.S.L.W. 4565, 4572 (U.S. May 14, 1984). Petitioner falls far short of proving that Seffern was subject to an actual conflict of interest. Since no prejudice has been shown --indeed, in our prior opinion we rejected a claim that Seffern's performance was ineffective-- and since we will not presume prejudice absent an actual conflict of interest, we hold that Seffern gave petitioner the "reasonably effective assistance" of counsel required by the sixth amendment. *Strickland*, 52 U.S.L.W. at 4570. Because we hold that Seffern's services met the standard required by the sixth amendment, there is no need for us to consider whether petitioner's statement on the fourth day of trial, elicited by the trial judge, that he was satisfied with Seffern's services amounted to a waiver of his sixth amendment right.

IV

That part of the district court's order refusing to dismiss the indictment against petitioner will be

affirmed. That part of the order granting petitioner a new trial will be reversed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

v.

ANTHONY J. COSTANZO,

Defendant.

Criminal No. 77-383

OPINION

[as filed Nov. 17, 1982
and amended Nov. 18, 1982]

Appearances: W. Hunt Dumont
United States Attorney
By: Cecilia L. Gardner
Special Attorney
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970 Broad Street
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(For the Government)

Clark, Wulf & Levine
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Ramsey Clark, Esq.
113 University Place
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(Attorneys for Defendant)

FISHER, Chief Judge.

This application, brought by Anthony Costanzo for a new trial under rule 38, F. R. Cr. P., and to vacate his sentence under 28 U.S.C. §2255 following a conviction under a two-count indictment for conspiracy to possess and possession of stolen United States Treasury checks in violation of 18 U.S.C. §§ 371 and 1708, was originally denied by the trial court. On appeal to the Third Circuit Court of Appeals, the matter was remanded for an evidentiary hearing. The case was then reassigned here.

The court of appeals indicated that the hearing should address the issues of whether there was an attorney-client relationship, or any confidential relationship, between Costanzo and one Frank A. Paglianite, an attorney, and, if so, did Paglianite disclose to the Government

matters which intruded on Costanzo's sixth amendment rights? At the outset, the court indicated that it would also take evidence as to whether Costanzo was denied effective assistance of counsel and whether the United States violated the requirements of Brady v. Maryland, 373 U.S. 83 (1963), and the Jencks Act, 18 U.S.C. §3500. Although the resolution of these issues was not mandated by the court of appeals, permission was granted to address them.

Insofar as the Brady and Jencks Act violations are concerned, the court's inspection of the Government's file disclosed none, and I find no merit in petitioner's application on these grounds. I also find no basis for relief on the trial court's denial of an adjournment when a substitution of attorney took place shortly before trial.

The testimony has disclosed that Frank Paglianite was at times a lawyer who was supposed to have been representing Costanzo, at time a business partner, and at times a joint adventurer with Costanzo in seemingly criminal enterprises. He was licensed to practice law in the State of New Jersey up until this year.[1]

Although Costanzo's testimony is very difficult to credit, it seems he was a continuous victim of Paglianite's financial machinations and slovenly, highly questionable, sometime representation. Their partnership mainly dealt with money matters. For instance, Costanzo loaned money to Paglianite to obtain a charter for a bank. In 1973 they co-signed a $16,000 note for funds to be used for a

---

[1] Paglianite was disbarred by the New Jersey Supreme Court on June 14, 1982, and by this court thereafter.

business venture. Paglianite used funds obtained from or with the assistance of Costanzo in a political campaign and to buy expensive automobiles. These are only a few of the ventures jointly entered into by these two thoroughly unsavory people. On a more sinister level, both were involved in 1977 in a scheme to defraud Citibank, which was investigated by the Federal Bureau of Investigation. As to Paglianite's legal representation of Costanzo, it seemed to be intermittent and was confined to some business transactions. Indeed, if Constanzo is to be believed, Paglianite neglected to file the proper pleadings, leading to Costanzo's property being foreclosed. At any rate, Costanzo did not produce any bills for legal work from Paglianite beyond 1976. Costanzo did produce a tape recording of a conversation between him and Paglianite

which indicated to me that Paglianite was a thoroughly unscrupulous, unstable man.

It is important here to emphasize that Costanzo is no novice in criminal activity. He admitted at the hearing to having been convicted of five separate federal crimes, all involving fraud. While, as I said, I could not credit very much of Costanzo's testimony, it is clear that he was not represented by Paglianite in the proceedings under review. Paglianite seems to have been present at an arraignment before a magistrate in this proceeding and also before a state judge. In neither case did he appear of record; nor did he appear of record at any time later in the proceedings.

Costanzo related that during the trial he and his attorney, John Seffern, talked to Paglianite on the telephone. Seffern

agreed. The court places no credence in these reports but, even if the calls occurred, nothing harmful was relayed that I can discern. I find that there was no attorney-client relationship between Costanzo and Paglianite in this proceeding.

There is no question, however, that Paglianite was an informer for the Federal Bureau of Investigation. He dealt with agents Fall and Mackey. These officers, I find, were careful to insure that any information they received from him did not involve matters which evolved from the Paglianite-Costanzo relationship. They warned Paglianite that they didn't want and would not accept this type of information. Additionally, they frequently checked with their superiors to make sure they were avoiding any impropriety.

They were instructed not to accept any information which dealt with any attorney-client relationship or defense strategy but to take any communication which would indicate criminal activity. They recorded in their files four communications which might have some bearing on the case.

(1) On December 2, 1977, Paglianite told an agent that one private detective was to "get" another;

(2) On December 22, 1977, Paglianite reported that Costanzo was taping a federal agent;[2]

(3) On December 13, 27, and 29, 1977, Paglianite informed an agent that Costanzo was attempting to bribe him to file a false affidavit; and

(4) In early January 1978 Paglianite informed an agent that Costanzo's lawyer, John Seffern, had been suspended from practicing law in the State of New York.

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2. This was not pursued in any depth at trial. I infer that this would not be helpful to petitioner. Apparently, Costanzo was cooperating with the FBI in another investigation.

None of this had any impact on the trial so far as I am able to discern, except the information regarding Seffern's suspension. Therefore, I find that there was no attorney-client relationship between Paglianite and Costanzo and, secondly, there was nothing in Paglianite's informant status with the Federal Bureau of Investigation or the information that he supplied which impinged on petitioner's sixth amendment rights.

Thrown into the petition and only weakly argued by petitioner is the claim that John Seffern, suspended New York practitioner, served as his trial counsel which, it is asserted, violated his right to effective assistance of counsel. Seffern was admitted to the practice of law in the State of Wisconsin in 1951 and to the bar of the State of New York in 1954.

He was later admitted to practice before the United States Court of Appeals for the Second Circuit and the United States District courts of the Eastern and Southern Districts of New York.

He was suspended from the practice of law in the State of Wisconsin for non-payment of Wisconsin state bar membership dues on May 31, 1974.[3] He was suspended from the practice of law in the State of New York for a period of two years, effective July 20, 1976, for the commingling of funds. He has not been reinstated. Seffern was finally suspended from practice in the United States District Court for the Southern District of New York in July 1981, retroactive to June 29, 1976, and from the Eastern District of New York in April 1981 and the

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3. Exhibit P-2, letter from the State of Wisconsin, Supreme Court Chambers, Madison, by William Manor, Supreme Court Commissioner.

United States Court of Appeals for the Second Circuit in April 1981.

It seems clear that his suspension by the federal courts was derivative, emanating from his suspension from the New York bar. It is equally clear that these latter suspensions would have predated his appearance at this trial had the administrative machinery been more efficient. When the Government learned of Seffern's suspension in New York, trial had already begun. The trial judge ascertained that Seffern had not yet been suspended in the United States Court of Appeals for the Second Circuit and the United States District Courts for the Southern and Eastern Districts of New York. He was informed that Costanzo knew of his lawyer's status and that he was satisfied with his representation. Following this, the trial judge permitted

Seffern to continue as counsel.

The Government argues that the fact that Seffern had not been suspended in several federal courts, added to the expressed satisfaction with his lawyer by Costanzo, disposes of the adequate-representation issue. This position ignores the "grave concern" expressed by the court of appeals on the initial application under 18 U.S.C. §2255. United States v. Costanzo, 625 F. 2d 465, 470-71 n. 4 (3d Cir. 1980). There it was indicated that nothing should preclude petitioner from raising this issue in the district court.

I am not confronted with the problem of dual representation which could result in ineffective assistance of counsel such as is reflected in the decisions in such cases as United States ex rel. Hart v. Davenport, 478 F. 2d 203 (3d Cir.

1973); United States v. Dolan, 570 F. 2d 1177 (3d Cir. 1978); nor United States v. DeFalco, 644 F. 2d 132 (3d Cir. 1979), where an indicted lawyer, while dealing with the Government in his own plea-bargaining negotiations, represented a defendant on appeal in a criminal action brought by the Government.

The problem facing me here is whether the representation of the defendant in a serious criminal matter by a lawyer who had been temporarily disbarred from the practice of law in the state of his domicile but, through administrative oversight or delay in processing his sanction, was not suspended in federal courts where his admission thereto is vicarious, deprives that defendant of the effective assistance of counsel. There is also the added factor that the attorney, because of his suspension, had not practiced law in his state for several years.

I acknowledge that another judge viewing this same matter, albeit under different circumstances, permitted the continued representation of the defendant by Seffern because it did not offend the letter of our local rules. That judge, however, had to make an instant decision in the middle of an ongoing case where a mistrial would have resulted not only in a retrial expensive to both the defendant and the United States, but also in those possible problems, including a double-jeopardy situation, engendered by a mistrial. I have had the luxury of reflection, study, and a record upon which to deliberate.

Rule 4C of the local rules of the District of New Jersey provides in pertinent part that "[a] ny member in good standing of the bar of any court of the United States or of the highest court

of any state ... may in the discretion of the court, on motion, be permitted to appear and participate in a particular case ...." It would seem that Seffern was eligible to practice in this district because action on his New York state suspension had not been taken in the federal courts. In my view, however, rule 4C does not permit a disbarred or suspended lawyer to practice in the District of New Jersey.

The reason behind the adoption of this rule was to permit practitioners in good standing in other jurisdictions to be admitted pro hac vice in this district to try a particular case. It is a rule of comity and courtesy to the bar in general. In interpreting the rule, this court cannot permit its language to be used to lead to injustice, unreasonableness or absurdity. To admit a lawyer suspended

for the offense Seffern committed is, to me, so absurd as to shock general morality and common sense. It is plain that his admission here was offensive to the spirit and the intention of rule 4C, with the result that petitioner in reality had no representation in fact. A new trial is mandated. The Government will submit an order. No costs.

s/ Clarkson S. Fisher
CLARKSON S. FISHER, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA

v.

ANTHONY J. COSTANZO,

Defendant.

Criminal No. 77-383

ORDER

[filed Nov. 29, 1982
and entered Dec. 22, 1982]

This matter having been brought upon the motion of the defendant Anthony J. Costanzo (Melvin L. Wulf, Esq. appearing) seeking a new trial under R. 35, F. R. Cr. P., and to vacate his sentence under 28 U.S.C. Section 2255 and the United States (Cecilia L. Gardner, Special Attorney, appearing) having opposed said motion and the Court having

heard testimony at the evidentiary hearing and having considered all the moving papers,

IT is on this 29th day of November, 1982

ORDERED and ADJUDGED that:

1. Petitioner's motion for a new trial based on alleged violations by the Government of the requirements of Brady v. Maryland, 373 U.S. 83 (1963), and the Jencks Act, 18 United States Code, Section 3500 is denied.

2. Petitioner's motion for a new trial based on the trial court's denial of an adjournment when a substitution of attorney took place shortly before trial is denied.

3. Petitioner's motion for a new trial based on the alleged violation of his sixth amendment right to counsel is denied. There was no attorney-client

relationship between Paglianite and Costanzo and nothing in Paglianite's informant status with the Federal Bureau of Investigation or the information that he supplied which impinged on petitioner's sixth amendment rights.

4. Petitioner's motion for a new trial based on ineffective assistance of counsel is granted. No costs.

s/ Clarkson S. Fisher
HON. CLARKSON S. FISHER
Chief Judge
United States District Court
District of New Jersey

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

v.

ANTHONY J. COSTANZO,

Defendant.

Criminal No. 77-383

OPINION

[filed Jan. 25, 1983]

Appearances: W. Hunt Dumont
United States Attorney
By: Samuel Rosenthal, Esq.
Assistant United
States Attorney
970 Broad Street
Newark, NJ 07102

(For the Government)

Clark, Wulf & Levine
By: Melvin L. Wulf, Esq.
113 University Place
New York, NY 10003

(Attorneys for Defendant)

FISHER, Chief Judge.

Following the filing of my opinion in petitioner's application under 28 U.S.C. §2255, the Government has filed a motion for reconsideration of my decision that representation by a disbarred lawyer is a violation of the sixth amendment rights of a defendant. To persuade me to change my mind the Government offers a recent opinion by a respected district judge in the Eastern District of New York in Solina v. United States, CV 82-0681 (70 CR 771)(E.D.N.Y. 1982).

That case stands for the proposition that the sixth amendment does not require representation by duly licensed or even legally trained attorneys. Judge Mishler felt that the main factor for consideration is whether the services rendered by the "attorney" resulted in prejudice to his client under certain objective standards of measurement. The Solina court

applied the rather strict Second Circuit standard for determining whether counsel's performance met sixth amendment demands: representation so "deficient as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." Indiviglio v. United States, 612 F. 2d 624, 626-27 (2d Cir. 1979). Finally, Judge Mishler found representation by a non-attorney sufficient as long as it complied with minimum standards of the legal profession.

The standards embraced in Solina have not, however, been so universally applied as that opinion indicates. The Supreme Court has ruled that the denial of such a basic constitutional right as that of effective assistance of counsel can never be regarded as harmless error. Holloway v. Arkansas, 435 U.S. 475, 489 (1978). Similarly, before any "constitutional error

can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). Glasser v. United States, 315 U.S. 60 (1942), found assistance of counsel too "fundamental and absolute" a right to "indulge in nice calculations as to the amount of prejudice arising from its denial." Id. at 75. These cases, while not directly on point with the factual situation in the instant case,[1] indicate the relative values the Court assigns to the fundamental right to counsel vis-a-vis a calculation of the amount of harm resulting from its denial.

Recent decisions from the lower federal courts have demonstrated a similar

1. Glasser and Holloway concerned attorneys representing multiple defendants, while Chapman revolved around a prosecutor's comments on a defendant's failure to testify.

assessment of priorities in this area. At least one circuit, the Fifth, has explicitly adopted a standard that makes representation by unlicensed counsel a per se constitutional violation. McKinzie v. Ellis, 287 F. 2d 549 (5th Cir. 1961).[2] The District of Columbia Circuit strongly condemned the practice in question in Harrison v. United States, 387 F. 2d 203 (D.C. Cir. 1967), declaring that sixth amendment demands are not satisfied "when the accused is 'represented' by a layman masquerading as a qualified attorney; it is unthinkable that so precious a right, or so grave a responsibility, can be entrusted to one who has not been admitted to the practice

2. The Solina opinion states that Beto v. Barfield, 391 F.2d 275 (5th Cir. 1968) overrules McKinzie. However, it only overrules the former case as to what specifics qualify an individual as a "practicing" attorney, not as to the relevant issue here of whether a "non-practicing" attorney may constitutionally represent a client.

of law, no matter how intelligent or well educated he may be." Id. at 212. Finally, the Third Circuit and this district have specifically listed an individual's position as a "member in good standing at the bar" as one of the factors necessary to make "services of counsel meet the requirements of due process." United States ex rel. Darcy v. Hanly, 203 F. 2d 407, 427 (3d Cir. 1953); Ellis v. New Jersey, 298 F. Supp. 298, 303 (D.N.J. 1967).

The aforementioned viewpoint has not been universally adopted, as shown by cases such as Solina and United States v. Merritt, 528 F. 2d 650 (7th Cir.1976). The Supreme Court has, however, demonstrated a deep respect for sixth amendment rights and an acute sensitivity to any abridgement. In addition, there exists viable support in certain of the circuits for the principle that represen-

tation by an individual not licensed to practice law is insufficient to meet the demands of the sixth amendment. Therefore, there is ample basis to rule that the controversial "representation" in the instant case denied defendant his constitutional rights.

The motion to reconsider is denied. The Government will submit an order. No costs.

January 25, 1983

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

v.

ANTHONY J. COSTANZO,

Defendant.

Criminal No. 77-383

ORDER

[filed Feb. 8, 1983,
and entered Feb. 9, 1983]

This matter having been opened to the Court on a motion of the United States Attorney for the District of New Jersey, W. Hunt Dumont (Samuel Rosenthal, Assistant U.S. Attorney, appearing, in the presence of counsel for Anthony Costanzo, Clark, Wulf & Levine (Melvin L. Wulf, Esq., appearing)), for reconsideration of the Court's Order dated November 29, 1982, granting a new trial based upon in-

effective assistance of counsel, and for an Order supplementing the record with a Certificate of Good Standing dated March 27, 1981 issued by the Clerk of the United States District Court for the Eastern District of New York, setting forth that John J. Seffern was a member in good standing in that Court, and the Court having considered this supplement to the record, the briefs submitted by the United States and by defendant, and heard oral argument.

It is on this 8th day of February, 1983, hereby

ORDERED that the motion of the United States to supplement the record be and the same hereby is granted, and it is

FURTHER ORDERED that the motion of the United States for reconsideration be and the same hereby is denied.

s/ Clarkson S. Fisher
CLARKSON S. FISHER
Chief Judge,U.S. District Court

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-5767, 83-5233, 83-5341/42

UNITED STATES OF AMERICA,
Appellant in No. 83-5233

vs.

ANTHONY J. COSTANZO,
Appellant in Nos. 82-5767,
83-5341/42

(D.C. Crim. No. 77-383-01)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF NEW JERSEY - NEWARK

Present: SEITZ and GARTH,
Circuit Judges, and

DIAMOND,
District Judge*

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* The Honorable Gustave Diamond, United States District Judge for the Western District of Pennsylvania, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel February 28, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed November 29, 1982, as made final by its order entered December 22, 1982, and as supplemented by its order entered February 9, 1983, be, and the same is hereby affirmed insofar as it refused to dismiss the indictment against petitioner. It is further ordered and adjudged that the order of the said District Court entered November 29, 1982, be and the same is hereby reversed insofar as it granted petitioner a new trial. All the above in

accordance with the opinion of this Court.

ATTEST

s/ Sally Mrvos

Clerk

July 26, 1984

Certified as a true copy and issued in lieu of a formal mandate on September 4, 1984.

Test: M. Elizabeth Ferguson
Chief Deputy Clerk
U.S. Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5767
No. 83-5233
No. 83-5341
No. 83-5342

UNITED STATES OF AMERICA,

Appellant in No. 83-5233

v.

ANTHONY J. COSTANZO

Anthony J. Costanzo, Appellant in Nos. 82-5767, 83-5341/42

(Criminal No. 77-383-01 - D. N.J.)

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, Chief Judge, SEITZ, ADAMS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, Circuit Judges, and DIAMOND, District Judge.*

The petition for rehearing filed by appellant Anthony J. Costanzo, in the above

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* The Honorable Gustave Diamond, United States District Judge for the Western District of Pennsylvania, sitting by designation.

entitled cases having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Seitz
Circuit Judge

DATED: August 27, 1984

Office-Supreme Court, U.S.
FILED
MAY 24 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1225

In the Supreme Court of the United States

OCTOBER TERM, 1984

ANTHONY J. COSTANZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

SAMUEL ROSENTHAL
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the actions of a government informant violated petitioner's Sixth Amendment rights.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1225

ANTHONY J. COSTANZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) in these proceedings under 28 U.S.C. 2255 is reported at 740 F.2d 251, and the prior opinion of the court of appeals in these proceedings is reported at 625 F.2d 465. The opinions of the district court dated November 18, 1982 (Pet. App. A18-A33) and January 25, 1983 (Pet. App. A37-A43) are unreported. The court of appeals' affirmance of petitioner's conviction on direct appeal is reported at 591 F.2d 1337 (Table), cert. denied, 441 U.S. 961.

JURISDICTION

The judgment of the court of appeals (Pet. App. A46-A48) was entered on July 26, 1984, and the petition for rehearing was denied on August 27, 1984 (Pet. App. A49-A50). The petition for a writ of certiorari was filed on January 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted in 1978 of conspiracy to possess United States Treasury checks knowing them to have been stolen from the mail, in violation of 18 U.S.C. 371 (Count 1), and possession of those checks, in violation of 18 U.S.C. 1708 (Count 2). He was sentenced to two and one-half years' imprisonment on the conspiracy count, which term has now been completed. Imposition of the sentence on the substantive count was suspended, with petitioner being placed on probation for a period of five years.

1. The evidence at trial showed that petitioner tried to sell nine Treasury tax refund checks, which had been stolen from the mail, to Patrick Kelly, a government informant. During a meeting, in accordance with instructions by FBI agents, Kelly directed petitioner to an FBI agent, who was working undercover at a sham trucking company staffed by undercover agents. Petitioner met twice with the agent, each time for the purpose of arranging a sale of the stolen checks. During the course of the second, tape-recorded conversation, petitioner sold the checks to the agent for $1500, which he received in thirty pre-marked $50 bills. 625 F.2d 465, 466 (1980).

The defense consisted of petitioner's testimony that he had been entrapped because the government allegedly had been dissatisfied with his role as a government informant. He maintained that the government had framed him by having Kelly ask him to take the envelope containing the checks to the trucking company. Although petitioner admitted that some of the remarks made by him in the taped conversation related to criminal activities, he argued to the jury that he fabricated some of the remarks and that Kelly furnished the remainder, and that he made those statements only to allow him to "blend in" at the operation, which he suspected was illegal, so that he could report any information to the government. 625 F.2d at 466.

The government disclosed to the court during trial that petitioner's attorney, John Seffern, had been suspended from practice in state court in New York.[1] Petitioner informed the court that he had been aware of this fact prior to retaining Seffern, that he was "satisfied with [him]," and that Seffern was "conducting the case in accordance with [petitioner's] desires" (Tr. 616).

Following his conviction, petitioner argued on appeal that the government had presented false evidence at trial and had negligently suppressed other exculpatory evidence, and that he had been convicted on the basis of "other crimes" evidence and erroneous instructions to the jury. The court of appeals affirmed the conviction in an unpublished judgment

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[1] The suspension, for commingling of funds, was for two years, effective July 20, 1976. However, Seffern had not been reinstated by the time of the district court's ruling on petitioner's motion under 28 U.S.C. 2255 (Pet. App. A27).

order, 591 F.2d 1337 (1979) and this Court denied review, 441 U.S. 961 (1979).

2. a. Petitioner then filed a motion under 28 U.S.C. 2255 to vacate his conviction on the ground, inter alia, that the actions of Frank Paglianite, an attorney who was a government informant during the time of petitioner's trial, violated his Sixth Amendment right to the assistance of counsel. The district court denied the motion, but the court of appeals remanded for an evidentiary hearing regarding Paglianite's relationship to petitioner and the nature of any communications he made to the FBI. 625 F.2d at 470. Although the issue was not raised by petitioner, the court of appeals also expressed concern over the fact that defense counsel had been suspended from the practice of law in New York, and the court of appeals indicated that this issue might similarly be considered by the lower court. 625 F.2d at 470-471 n.4.

b. After a hearing regarding Paglianite's role and the extent of information supplied by him to the government, the district court held that there was no Sixth Amendment violation as a result of Paglianite's actions. Finding petitioner's testimony "very difficult to credit" (Pet. App. A21), the court concluded that there "was no attorney-client relationship between Costanzo and Paglianite in this proceeding" (*id.* at A24). The court explained that the relationship between petitioner and Paglianite was primarily a business partnership (*id.* at A21-A22), which included participation in "seemingly criminal enterprises" (*id.* at A21). The court also observed that any legal representation of petitioner by Paglianite was "intermittent" and "confined to some business transactions," and that it apparently had ceased by the time

of petitioner's trial in 1978, since petitioner did not produce any bills for legal services after 1976 (*id.* at A22).

The district court further found that Paglianite's status as an informant did not give rise to a Sixth Amendment violation, because the FBI agents were "careful to insure that any information they received from [Paglianite] did not involve matters which evolved from the Paglianite-Costanzo relationship"; had "warned Paglianite that they didn't want and would not accept this type of information"; and "frequently checked with their superiors to make sure they were avoiding any impropriety" (Pet. App. A24). The district court also considered four specific communications from Paglianite to the FBI that were noted in the FBI agents' files and found that none "had any impact on the trial," except for Paglianite's disclosure that petitioner's attorney, Seffern, had been suspended from practice in the state courts of New York (*id.* at A25-A26).

As to the latter disclosure, on the day after Paglianite told the FBI agent of Seffern's status, counsel for the government informed the trial court of the suspension. That was on the fourth day of trial. The court then inquired into Seffern's standing, and Seffern stated that he was in good standing in the state courts in Wisconsin and in the United States District Courts for the Southern and Eastern Districts of New York and the United States Court of Appeals for the Second Circuit.[2] On the basis of those memberships, the district court concluded that Seffern qualified for

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[2] Seffern's statement that he was in good standing in the Wisconsin courts was not true, because he had been suspended from the Wisconsin bar in 1974 for nonpayment of dues (Pet. App. A12 & n.1).

admission pro hac vice under its local Rule 4(c). Pet. App. A12-A13. In these proceedings under 28 U.S.C. 2255, the district court acknowledged that the trial judge, confronted with the need to make decision mid-trial, had allowed Seffern to continue his representation (Pet. App. A31). But after the "luxury of reflection" (*ibid.*), the court on collateral attack concluded that the trial judge should not have allowed Seffern to appear pro hac vice under the court's local Rule 4(c). In the court's view, the result of the trial judge's action was that petitioner had "no representation in fact," and a new trial was required (Pet. App. A32-A33).

c. The court of appeals affirmed in part and reversed in part, holding that petitioner is not entitled to relief under 28 U.S.C. 2255 (Pet. App. A1-A17). The court of appeals affirmed the district court's ruling that no Sixth Amendment violation occurred as a result of Paglianite's status as an informant (Pet. App. A4-A11). The court first concluded that the district court's finding that petitioner and Paglianite did not have an attorney-client relationship in connection with the criminal prosecution was not clearly erroneous, in light of the evidence that Paglianite had never entered an appearance in the case, that petitioner's dealings with Paglianite near the trial date were of a business nature (including an elaborate scheme to defraud Citibank), and that petitioner had not paid Paglianite for legal services for some time prior to trial (*id.* at A4-A5). The court of appeals also found that there was no intentional intrusion by the government into the defense camp by virtue of Paglianite's status as an informant, because Paglianite had informed the FBI agents that he no longer represented petitioner and would not do so

in the prosecution, and because the FBI agents had instructed Paglianite not to disclose any information pertaining to defense strategy and had consulted with their superiors to make sure that their use of Paglianite remained within legal limits (*id.* at A5-A6). Finally, the court of appeals reviewed each of the four communications made by Paglianite that, in petitioner's view, established a Sixth Amendment violation, and it concluded that none involved a disclosure of confidential information or prejudiced petitioner (*id.* at A6-A11). On this basis, the court held that the district court correctly refused to dismiss the indictment under the Sixth Amendment on the basis of Paglianite's disclosures (*id.* at A11).

The court of appeals reversed the district court's holding that its local Rule 4(c) barred the trial judge from permitting Seffern to proceed pro hac vice (Pet. App. A11-A16). The court of appeals held that the local rules committed the matter to the trial judge's discretion and did not absolutely bar the trial judge from allowing Seffern to appear pro hac vice merely because he had been temporarily suspended from practice in his home state (Pet. App. A14-A15). The court also found no defects in Seffern's actual performance that gave rise to a Sixth Amendment violation (*id.* at A16).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review of petitioner's fact-bound claims is not warranted.

1. The district court found that there was no attorney-client relationship between petitioner and Paglianite in connection with petitioner's prosecution (Pet. App. A21-A24), and the court of appeals af-

firmed that determination (*id.* at A4-A5). That finding by the district court is, at the very least, not clearly erroneous. To the contrary, it is supported by the evidence indicating that Paglianite never entered an appearance in the case, that petitioner had not paid Paglianite for legal services for some time prior to trial, and that petitioner's dealings with Paglianite near the trial date were primarily of a business nature, including a scheme to defraud Citibank (*id.* at A5). The district court specifically stated that it "could not credit" petitioner's contrary testimony (*id.* at A21), and the court of appeals did not disturb that credibility ruling (*id.* at A5). It does not appear that petitioner directly challenges this determination that no attorney-client relationship existed, and this concurrent finding by the courts below would not in any event warrant review by this Court. *Berenyi* v. *INS*, 385 U.S. 630 (1967).

2. Petitioner nevertheless contends (Pet. 21-29) that the Court should grant review to consider what petitioner maintains (Pet. 21) is a question of "first impression"—the use of an attorney as a government informant. Petitioner does not explain, however, how Paglianite's status as a member of the bar is relevant if, as both courts below found, petitioner had no attorney-client relationship with Paglianite with respect to the prosecution, but was merely acting as any other government informant in providing information regarding petitioner's activities. Indeed, petitioner refers to the lower court's determination whether there was an attorney-client relationship as a "critical fact-finding" (Pet. 30), and the existence of an attorney-client relationship obviously was significant to the Court in *Black* v. *United States*, 385 U.S. 26 (1966), and *O'Brien* v. *United States*, 386 U.S.

345 (1967), upon which petitioner erroneously relies (Pet. 26-27).[3]

3. Petitioner next contends (Pet. 29-33) that his conviction should be reversed because Paglianite disclosed confidential information pertaining to defense strategy, in violation of the Sixth Amendment. This contention was correctly rejected by the court of appeals after a thorough review of each of the four communications in issue (Pet. App. A5-A11), three of which petitioner again relies upon in this Court.

a. First, petitioner contends that Paglianite's disclosure that Seffern had been suspended from the practice of law in New York was "confidential information learned in the defense camp" (Pet. 32). This contention is without merit. Counsel's suspension in New York State was a matter of public record and had nothing to do with defense strategy. Moreover, if counsel for the government had not brought this matter to the trial court's attention, the government might have been subject to criticism for allow-

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[3] In *Black* and *O'Brien*, the government overheard, by means of electronic surveillance, actual conversations transpiring between counsel and the defendant during the course of the criminal case. See 385 U.S. at 27; 386 U.S. at 346 (Harlan, J., dissenting). Moreover, the Court in *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), rejected the notion that the decisions in *Black* and *O'Brien* were meant to establish a per se rule requiring reversal of the conviction even when communications between the defendant and his attorney were overheard. 429 U.S. at 551-552. Rather, the court stated that "[i]f anything is to be inferred from these two cases with respect to the right to counsel, it is that when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial." 429 U.S. at 552. Under that standard, petitioner clearly is not entitled to prevail in this case.

ing the court's apparent misapprehension regarding Seffern's status to go uncorrected. Certainly, no Sixth Amendment violation occurred as a result of that incident.

b. Second, petitioner argues (Pet. 30-31) that the government learned in a December 2, 1977 communication from Paglianite of petitioner's plans to subpoena Charles Coveney, another FBI informant. The court of appeals correctly concluded, however, that the statement related by Paglianite to the FBI agent that petitioner's private detective was to "get" Coveney referred to a threat to harm Coveney, not to an effort to subpoena him to testify at trial, and that there was no prejudice to petitioner from this limited disclosure (Pet. App. A8-A9).[4] The obtaining of information about such threats does not violate the Sixth Amendment, because there is no Sixth Amendment right to counsel in connection with the planning or commission of such conduct. See, *e.g.*, *United States* v. *Darwin*, No. 82-5794 (11th Cir. Apr. 16, 1985), slip op. 3005.

c. Third, petitioner relies (Pet. 31-32) on a December 22, 1977 report by Paglianite to the FBI that petitioner had taped meetings with an FBI agent. Petitioner argued below that this communication revealed that petitioner had taped a particular meeting on April 5, 1976 at which, petitioner claimed, he was

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[4] Petitioner also points out (Pet. 30-31) that the FBI agent testified that he was first told by Coveney a month later that he had been subpoenaed. See Pet. App. A8-A9. That fact, however, does not suggest that the use of *Paglianite* as an informant was unlawful. To the contrary, this testimony confirms that the FBI agent did not understand Paglianite's report to refer to defense plans to subpoena Coveney. Pet. App. A9.

offered immunity from prosecution in exchange for providing information; petitioner maintained that he intended to use the tape at trial to impeach the FBI agent's testimony that he never offered petitioner immunity. See Pet. App. A9. The district court rejected petitioner's claim of a Sixth Amendment violation based on this disclosure, stating (Pet. App. A25 n.2):

> This was not pursued in any depth at trial. I infer that this would not be helpful to petitioner. Apparently, [petitioner] was cooperating with the FBI in another investigation.

The court of appeals likewise found no Sixth Amendment violation in this incident. It observed that there had been a number of meetings between petitioner and the FBI agent, and at least one of those meetings had been taped with the agent's knowledge. Moreover, the disclosure to the FBI that petitioner had taped conversations with the agent did not even refer to the April 5, 1976 meeting or to petitioner's intended use of the tape. Against this background, the court of appeals correctly concluded that the FBI had known for some time of the information imparted on December 22, 1977—that petitioner had recorded the FBI agent—and that the district court's finding that no confidential defense strategy was disclosed therefore was not clearly erroneous. Pet. App. A9-A10. Petitioner insists (Pet. 31-32) that even if the December 22 report did not specifically refer to the April 5 conversation or its possible use to impeach the FBI agent, the mere fact that the tapes were discussed disclosed defense strategy. The difficulty with this argument is that Paglianite's report to the FBI concerning petitioner's taping of conversations with an FBI agent did not state that this taping was

discussed in connection with the defense of the instant charges.

d. Finally, petitioner pointedly does not rely on the fourth set of communications by Paglianite to the FBI, in which Paglianite stated that petitioner was attempting to bribe him to file a false affidavit (Pet. App. A6-A7). As the court of appeals held (*id.* at A10), that information related to a prospective crime and is not protected by any Sixth Amendment privilege.

4. Petitioner next argues (Pet. 33-38) that the courts below should have found a Sixth Amendment violation because of what he characterizes as a "pervasive intrusion" by the government into the defense camp. This argument is untenable in light of the findings by both courts below. The district court found, and the court of appeals agreed, that there was no intentional intrusion and that FBI agents were careful to avoid receipt of any disclosures relating to defense information (Pet. App. A6, A24); and, as explained above, no confidential or useful information relating to defense strategy in fact was related by Paglianite to government agents. On this record, there plainly was no "pervasive intrusion" by the government into the defense camp.[5]

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[5] Petitioner argues (Pet. 28-29) that the agents' directions to Paglianite, warning him not to disclose information about the trial, were inadequate to safeguard "the confidences of counsel and trial strategy." However, petitioner fails to suggest how, if at all, they could have further protected against disclosure of confidential communications, except perhaps by prohibiting Paglianite from talking to petitioner or to them at all. Given the fact that Paglianite had informed the FBI of ongoing criminal schemes by petitioner unrelated to the prosecution, such as the fraud involving Citibank and the attempt to bribe Paglianite to submit a false affidavit, that course would

5. Finally, petitioner makes a catch-all argument (Pet. 38-41) that a Sixth Amendment violation occurred "[u]nder all the circumstances of this case" (Pet. 38). He renews only in passing the argument that he had no "representation in fact" because his attorney, Seffern, was suspended from practice in New York State. See *ibid.* The court of appeals correctly rejected that contention (Pet. App. A11-A16), and its ruling is consistent with the Ninth Circuit's rejection of a virtually identical claim in *United States* v. *Hoffman*, 733 F.2d 596 (1984), cert. denied, No. 84-5227 (Nov. 26, 1984). Disbarment or suspension of an attorney by a state court does not automatically bind a federal court to impose the same sanction. *Theard* v. *United States*, 354 U.S. 278, 282 (1957); *In re Ruffalo*, 390 U.S. 544, 547, modified on other grounds, 392 U.S. 919 (1968). See also *In re Gordon*, 640 F.2d 1143, 1146 (10th Cir. 1981). At the time of petitioner's trial, Seffern had not been suspended from practice before the United States District Courts for the Southern and Eastern Districts of New York or the United States Court of Appeals for the Second Circuit, and it therefore cannot be said that he was without the assistance of the "Counsel" to which the Sixth Amendment refers.

Petitioner also argues (Pet. 38-39) that Seffern's effectiveness was "questionable." However, petition-

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have prevented the agents from performing their investigative functions. Other information related to FBI agents by Paglianite, such as the fact that petitioner was trying to "get" a witness, were regarded by agents as relating to some attempt to harm the witness, and clearly could not have been ignored because of the possibility that the government would inadvertently obtain information about defense strategy despite the agents' efforts to avoid that consequence.

er's claim of ineffective assistance of counsel was correctly rejected by the court of appeals on petitioner's first appeal in these proceedings under 28 U.S.C. 2255 (625 F.2d at 470-471), and petitioner does not renew here any of the specific objections raised and rejected on that occasion. Nor does petitioner point to any other specific errors by counsel that were outside the range of reasonably effective assistance or show that there is a reasonable probability that, but for any such errors, the result of his trial would have been different. See *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984). Petitioner therefore is not entitled to relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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